No. 20196

UNITED STATES COURT of APPEALS

FOR THE NINTH CIRCUIT

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE County, *Appellant*,

vs.

CITY OF SEATTLE, *Appellee*.

CITY OF SEATTLE, *Appellant*,

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, *Appellee*.

On Appeal from the Judgment of the United States District Court for the Eastern District of Washington

PETITION OF APPELLANT-APPELLEE
Public Utility District No. 1 of Pend Oreille County
FOR REHEARING AND FOR MODIFICATION
to
THE HONORABLE CIRCUIT JUDGES HAMLEY AND MERRILL AND THE HONORABLE DISTRICT JUDGE BYRNE
the Court as constituted in the original hearing

CLARENCE C. DILL
763 Lincoln Building
Spokane, Washington 99201

ENNIS and KLOBUCHER
626 Lincoln Building
Spokane, Washington 99201

Attorneys for Appellant-Appellee, Public Utility District No. 1 of Pend Oreille County

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TO the Honorable Circuit Judges Hamley and Merrill and the Honorable District Judge Byrne, the Court as constituted in the original hearing:

On the appeal of PUD this Court proceeds on an erroneous understanding of the nature of value testimony that was stricken by the district court. In describing PUD's proof, this court said,

> *"Its witnesses valued the properties by capitalizing the earnings of a completed power plant at Z Canyon subtracting the cost of construction."* (Emphasis added.)

This important factual conclusion is incorrect. In no sense did the PUD witnesses value the properties and rights by capitalization of earnings. A review of the testimony of PUD's witnesses set out in the appendix to its opening brief will show that no amount of anticipated earnings was estimated and no capitalization process was performed. The record shows that:

1. After describing the capitalization of income approach, the witness Vaughan said, "In view of this fact I did not think it to be proper to use any form of the income approach in evaluating these rights." (R. Tr. 1084.)

2. The district court said, with reference to the witness Courtney, "It isn't a comparable sale approach, *it isn't a capitalization approach*. . . ." (R. Tr. 1495) (Emphasis added.)

3. The testimony of PUD's witnesses was not objected to by Seattle on the grounds that it was based upon capitalization of earnings. (R. Tr. 1236-39, 1460-64).

The decision on PUD's appeal, having been based upon the erroneous belief that its witnesses valued the properties "by capitalizing the earnings of a completed power plant at Z Canyon, subtracting the cost of construction," calls for a reconsideration.

The opinion admits the concept of power site value described as "the highly enhanced value that may attach to the fully assembled land package (and its several parts) due to the fact that the prospective power project is dependent upon use of that package," but concludes that this type of value cannot be proven by capitalization of anticipated earnings because such proof "necessarily assumed the acquisition of an FPC license." Conceding the logic of this conclusion, it nevertheless is not dispositive of this case where the PUD witnesses did not arrive at value by use of the capitalization of earnings approach.

This court recognized that the district court had found the PUD could be credited with having such a "fully assembled land package." There have been no sales of a comparable package, and PUD witnesses used the only method available to prove value. Unlike the capitalization of income approach, their approach did not "necessarily" assume the acquisition of an FPC license. Because the PUD properties are on a navigable stream, the acquisition of an FPC license cannot be ignored. Its absence was recognized and the likelihood of its acquisition was weighed in arriving at value. (R. Tr. 1344, 1384.)

It is assumed the conclusion in the opinion that, "where condemnor and condemnee have competed for

a federal license, the prospects of the unsuccessful competitor, as a matter of foresight, must be deemed too speculative to permit him to attach value to the pre-existing likelihood of his succeeding in his efforts," applies only if it is sought to prove value by capitalization of earnings and was reached because of the mistaken belief that PUD had relied on that kind of testimony. If such conclusion was said to apply to the testimony of PUD's witnesses or other similar approaches not based upon capitalization of earnings, it would make a myth of the concept of true powersite value described above as there would be no way to prove it.

In condemnation actions brought under the Federal Power Act there will always be a successful applicant for the license who, in effect, will be the purchaser of the site by condemnation. The value of the site can be neither more nor less because the owner did or did not compete for a license. Many factors enter into the granting or denial of a license application that have nothing to do with the land package to be used in a project. For instance, the denial of a license to the owner of a land package because he fails to show an ability to finance a project does not destroy the value of the land package usable by a purchaser able to finance the project and to otherwise qualify for a license.

The statement in the opinion that,

> "The successful licensee, in effect, must assume and make compensation for the very deficiencies which caused failure of the condemnee's application."

is not applicable in the absence of a showing that "the deficiencies which caused failure of the condemnee's application" were deficiencies in the land package itself. No such showing was made.

The decision on PUD's appeal having been premised on an erroneous assumption of fact, which error of necessity permeated the balance of the opinion, a rehearing en banc is warranted.

In any event, as was done by the Circuit Court of Appeals, Fourth Circuit, in *United States ex rel. TVA v. Powelson et al.,* 138 F. 2d 343 (CCA 4th Cir., 1943) Cert. denied, 321 U.S. 773, 88 L. Ed. 1067, 64 Sup. Ct. 612 (1944), the opinion should be modified to provide for a remand of the cause to the district court with leave to the parties to produce additional testimony because the record is devoid of any evidence upon which an award of just compensation could be made.

The following factors warrant such a modification:

1. This court concluded its decision on Seattle's cross-appeal by saying, ". . . full market value, *including power site value,* is the proper measure of compensation." (Emphasis added.)

2. The findings of the district court that, "The highest and best use of the PUD properties sought to be condemned in this action is for hydroelectric purposes," and that, "The testimony of power site value as expressed by witnesses for the defendant having been stricken, the only evidence in the record as to value is that testified to by witnesses for the plaintiff,

which includes no power site value," were recognized and accepted by this court. (Emphasis added.)

3. Seattle, who opened and closed the testimony, elected not to submit further evidence of value after PUD in its case had established the highest and best use of its properties to be for hydroelectric purposes.

4. PUD, in its motion to reconsider the ruling striking its testimony of fair market value (R. 48-50), sought an order that would permit it to seek an interlocutory appeal to this court on this point.

5. PUD moved for a new trial based upon entry of judgment upon the testimony of plaintiff's value witnesses for the reason that such judgment did not afford it just compensation for the taking of its properties. (R. 100). This appeal, among other things, was based upon the denial of the motion for new trial. (Specifications of Error No. 7, p. 49, PUD's opening brief.)

6. Admittedly, under the record as it now stands, the properties of PUD will be taken without payment of just compensation contrary to the fifth amendment to the constitution.

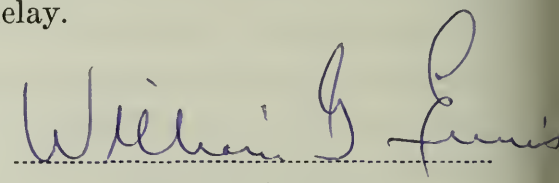
WHEREFORE, PUD RESPECTFULLY PRAYS that its petition for rehearing be granted. If a rehearing is not ordered, PUD prays that the decision be modified so as to direct a remand of the cause to the district court for further proceedings.

Respectfully submitted,

CLARENCE C. DILL
ENNIS and KLOBUCHER
By William D. Ennis

CERTIFICATE OF COUNSEL

I certify under Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit that in my judgment the foreging Petition for Rehearing and for Modification is well founded and that it is not interposed for delay.



William G. Ennis